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No. 96-1613

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

UNITED STATES OF AMERICA,

Petitioner,

v.

ESTATE OF FRANCIS J. ROMANI,

Respondent.

On Writ of Certiorari to the Supreme Court of Pennsylvania

BRIEF FOR RESPONDENT ROMANI INDUSTRIES, INC.

Of counsel:

LAWRENCE L. DAVIS
DAVIS AND DAVIS
103 South Center Street
Ebensburg, PA 15931
(814) 472-9740

PATRICK F. MCCARTAN
(Counsel of Record)
JONES, DAY, REAVIS & POGUE
North Point
901 Lakeside Avenue
Cleveland, Ohio 44114
(216) 586-3939

GREGORY G. KATSAS
JONES, DAY, REAVIS & POGUE
1450 G Street, N.W.
Washington, D.C. 20005
(202) 879-3939

Counsel for Respondent Romani Industries, Inc.

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QUESTION PRESENTED

Whether 31 U.S.C. § 3713(a), which creates priority but not security for any federal government claim against the estate of an insolvent debtor, is controlling for a government tax claim where (i) a competing creditor is secured by a judgment lien on the debtor's real property and (ii) the Federal Tax Lien Act of 1966, 26 U.S.C. § 6323(a), specifically provides that the lien securing the tax claim "shall not be valid" against that creditor.

PARTIES TO THE PROCEEDINGS

The parties below were the United States, Romani Industries, Inc., and the Estate of Francis J. Romani. Although the United States has captioned the case as *United States v. Estate of Francis J. Romani*, Romani Industries is a proper respondent by operation of this Court's Rule 12.6.

Romani Industries has no corporate parent or subsidiaries.

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STATUTES INVOLVED

The federal priority statute, as amended, 31 U.S.C. § 3713(a), and relevant portions of the Federal Tax Lien Act of 1966, as amended, 26 U.S.C. §§ 6321-6327, appear in their entirety in an appendix to this brief.

STATEMENT OF THE CASE

The Federal Tax Lien Act of 1966, which secures federal tax claims and comprehensively governs their priority, provides that a federal tax lien "shall not be valid" against a first-in-time judgment lien creditor. 26 U.S.C. § 6323(a). This case presents the question whether a federal tax claim nonetheless may prevail against a first-in-time judgment lien creditor by operation of 31 U.S.C. § 3713(a), which creates no security interest at all, but which affords a priority for all federal government claims against insolvent debtors. Without dissent, the three courts below held that the specific provisions of the Tax Lien Act prevail over the general provisions of the federal priority statute. Accordingly, they concluded that the secured judgment held by respondent Romani Industries must be satisfied before the unsecured tax claim held by the government.

1. On January 25, 1985, respondent Romani Industries, Inc. recorded a $400,000 judgment against Francis J. Romani in the clerk's office of the Court of Common Pleas for Cambria County, Pennsylvania. Pet. App. 21a-22a. Under Pennsylvania law, the recording of that judgment created a lien on all of the real property owned by Mr. Romani in Cambria County. 42 Pa. Cons. Stat. Ann. Section 4303(a).[1] Pennsylvania law treats such

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[1] In pertinent part, Section 4303(a) provides:

> Any judgment or other order of a court of common pleas for the payment of money shall be a lien upon real property . . . when it is entered of record in the office of the clerk of the court of common pleas of the county where the real property is situated, or in the office of the clerk of the branch of the court of common pleas

a judgment lien as a mature property interest fully entitled to federal and state constitutional protection. *See In re Upset Sale*, 479 A.2d 940, 943-44 (Pa. 1984). In particular, it defines judgment liens as "no less property interests" than mortgages. *See id.* at 944.

After Romani Industries obtained its judgment lien, the Internal Revenue Service filed notices of federal tax liens, for an amount totalling approximately $490,000, on the property of Mr. Romani. Pet. App. 2a. Those liens arose under the Federal Tax Lien Act of 1966, which provides that if any person refuses to pay a tax "after demand" by the IRS, the unpaid amount constitutes a lien in favor of the United States on all of that person's real and personal property, wherever located. 26 U.S.C. Section 6321, App. 2a.[2] The Tax Lien Act also comprehensively regulates the priority of these tax liens against competing claims and interests. Most relevant here, it provides that a lien imposed under Section 6321 "shall not be valid" against four categories of competing claimants — "any purchaser, holder of a security interest, mechanic's lienor, or judgment lien creditor" — until notice of the lien has been publicly filed in an office designated by the State where the encumbered property is located. 26

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embracing such county.

[2] Section 6321 provides:

> If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

26 U.S.C. § 6321. The next section of the Tax Lien Act confirms that this lien arises "at the time the assessment is made" by the IRS. *Id.* § 6322.

U.S.C. § 6323(a), App. 2a.[3] The Tax Lien Act further provides that a lien imposed under Section 6321 "shall not be valid" against ten other categories of interests even after notice of the lien has been so filed. 26 U.S.C. § 6323(b), App. 2a-5a. The Act further provides special protection for certain elaborately defined "commercial transactions financing agreements." 26 U.S.C. § 6323(c), App. 5a-9a. The Act also specifically defines many of the other protected security interests. 26 U.S.C. § 6323(h), App. 14a-15a. And it provides an entirely distinct set of liens and priorities for various estate and gift taxes. 26 U.S.C. §§ 6324, 6324A, 6324B, App. 17a-24a.

When Mr. Romani died in 1992, he left as his entire estate a piece of real property located in Cambria County and valued at approximately $53,000. Pet. App. 2a. The property remained encumbered both by Romani Industries' judgment lien and by the government's federal tax lien. *Id.* The administrator of the estate filed a petition in the Court of Common Pleas for Cambria County to transfer the property to Romani Industries in lieu of execution, on the ground that the Tax Lien Act expressly invalidated the government's tax lien as against Romani Industries' first-in-time judgment lien, and that Romani Industries' secured claim therefore prevailed as against the government's unsecured claim. The government opposed the motion under 31 U.S.C. § 3713(a), App. 1a, which the government characterizes as an "absolute priority statute" (Pet. Br. *passim*), but which this Court has more modestly described as simply the "priority

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[3] Section 6323(a) provides that "[t]he lien imposed by section 6321 shall not be valid as against any purchaser, holder of a security interest, mechanic's lienor, or judgment lien creditor until notice thereof which meets the requirements of subsection (f) has been filed by the Secretary" of the Treasury. App. 2a. Section 6323(f)(1), in turn, provides in pertinent part that the notice shall be filed in an office designated by the state "in which the property subject to the lien is situated." App. 10a-11a. Section 6323(f)(2) provides that real property is situated "at its physical location" and that personal property is deemed to be situated "at the residence of the taxpayer" when the notice is filed. App. 11a.

statute," *e.g.*, *Department of the Treasury v. Fabe*, 508 U.S. 491, 493 (1993); *United States v. Moore*, 423 U.S. 77, 81 (1975). In pertinent part, Section 3713(a) provides that a federal claim "shall be paid first" when the estate of a deceased debtor is "insolvent" in the sense that its assets are "not enough to pay all debts of the debtor."[4]

2. The court of common pleas granted the motion to transfer the real property to Romani Industries. The court acknowledged the conflict in this case between the Tax Lien Act, which would give priority to Romani Industries' first-in-time judgment lien, and Section 3713(a), which would give priority to the government's claim against an insolvent estate. Pet. App. 23. Citing the prior Pennsylvania decisions in *In re Estate of Berretta*, 426 A.2d 1098 (Pa. 1981), and *In re Meyer's Estate*, 48 A.2d 210 (Pa. Super. Ct. 1946), and the principle of statutory construction that "specific provisions should prevail over conflicting general ones," the court concluded that the priority provisions of the Tax Lien Act, which were "enacted to govern tax debts specifically," must prevail over the federal priority statute, which "references federal debts generally." Pet. App. 23a-24a.

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[4] In its entirety, the federal priority statute provides:

> (1) A claim of the United States Government shall be paid first when —
>
> (A) a person indebted to the Government is insolvent and —
>
> (i) the debtor without enough property to pay the debts makes a voluntary assignment of property;
>
> (ii) property of the debtor, if absent, is attached; or
>
> (iii) an act of bankruptcy is committed; or
>
> (B) the estate of a deceased debtor, in the custody of the executor or administrator, is not enough to pay all debts of the debtor.
>
> (2) This subsection does not apply to a case under title 11.

The Superior Court of Pennsylvania unanimously affirmed. That court too concluded that the priority provisions of the Tax Lien Act and of Section 3713(a) "produce[d] conflicting results" in this case. Pet. App. 19a. That court too resorted to the "familiar and time honored principle" that "conflicting provisions must be construed together with the more specific provisions prevailing over the general ones." Pet. App. 20a. And, that court too concluded that the Tax Lien Act "is the more specific provision because it applies *only* to federal tax liens," whereas the priority statute "applies to *any* unpaid claim of the government against an insolvent debtor." *Id.* (emphases in original).

The Supreme Court of Pennsylvania also unanimously affirmed. That court concluded that there was a "plain inconsistency" between the respective statutes "because, with respect to tax liens, Section 6323 provides for a 'first in time' priority while Section 3713 gives absolute priority to the United States." Pet. App. 6a-7a. Accordingly, the court held that the Tax Lien Act priorities must prevail, either as an "'implied exception'" to Section 3713, Pet. App. 5a (citing *United States v. Emory*, 314 U.S. 423 (1941) and *United States v. Key*, 397 U.S. 322 (1970)), or under the principle that the "more specific" provisions of the Tax Lien Act qualify the "general" provision of Section 3713, Pet. App. 6a n.9. Quoting from then-Chief Judge Haynsworth's concurring opinion in *H.B. Agsten & Sons, Inc. v. Huntington Trust & Savings Bank*, 388 F.2d 156, 161 (4th Cir. 1967), *cert. denied*, 390 U.S. 1025 (1968), the court explained that the Tax Lien Act priorities "would be essentially meaningless" if Section 3713 "always prevailed" when the debtor was insolvent:

> "The question of priorities . . . is wholly or largely academic, unless the debtor is insolvent, and the clearly stated purpose of the Federal Tax Lien Act of 1966 was to regulate the priority of federal tax claims when competing for payment out of the assets of an insolvent taxpayer with secured claims which would enjoy priority under state law."

Pet. App. 11a n.16. After reviewing the text and legislative history of the Tax Lien Act, and this Court's discussion of those

materials in *United States v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979), the court further concluded that the Tax Lien Act evidenced an affirmative congressional intent "that federal priorities be limited in the tax area, regardless of whether the debtor is insolvent." Pet. App. 13a.[5]

SUMMARY OF ARGUMENT

I. A. 1. The federal priority statute does not override traditional security interests. The priority statute originated in the crown's prerogative to priority of payment of debts. At common law, however, the royal prerogative did not apply to pre-existing security interests. When the federal priority statute was enacted, a century of English precedent had established that judgment liens would survive assertions of the royal prerogative. In this country, the states incorporated the same limitations into their respective common-law sovereign prerogatives.

2. In light of this tradition, the government bears a heavy burden to establish that the federal priority statute abrogates settled common-law protection for judgment liens and other security interests. This Court has held that statutes must speak directly to the question at issue in order to abrogate a settled common-law principle. The federal priority statute does not speak directly to the elimination of antecedent security interests. Instead, it creates only a priority of payment, itself unsupported by any lien or security interest.

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[5] The decisions below are consistent with a large body of lower court decisions holding that the specific priorities of the Tax Lien Act (or its antecedents) qualify the general provisions of the federal priority statute. *See, e.g., City of Vermillion v. Stan Houston Equip. Co.*, 341 F. Supp. 707, 713 (D. S.D. 1972); *Muniz v. United States*, 155 N.E.2d 140, 143-48 (Ind. Ct. App. 1958) (in banc); *Evans v. Stewart*, 66 N.W.2d 442, 448-49 (Iowa 1954); *James Talcott Inc. v. Roto American Corp.*, 302 A.2d 147, 150-51 (N.J. Super. Ct. 1973); *National Surety Corp. v. Sharpe*, 72 S.E.2d 109, 119-21 (N.C. 1952); *In re Decker's Estate*, 49 A.2d 714, 719-20 (Pa. 1946), *cert. denied*, 331 U.S. 807 (1947); *In re Meyer's Estate*, 48 A.2d at 212-15.

3. The Bankruptcy Code confirms the traditional understanding that priority provisions do not affect the rights of secured creditors. Bankruptcy law draws a fundamental distinction between priority provisions, which apply only to unsecured creditors, and security provisions. Bankruptcy law affords a high degree of protection to secured interests, which may be set aside only under narrow provisions specifically addressed to secured interests as such. This Court has recognized that bankruptcy law provides an apt analogy for construing the federal priority statute.

4. On at least four occasions, this Court has held that the federal priority statute does not override antecedent security interests. *United States v. Hooe*, 7 U.S. (3 Cranch) 73, 90 (1805) (mortgage); *Conard v. Atlantic Insurance Company*, 26 U.S. (1 Pet.) 386, 447 (1828) (bonds held as security); *United States v. Hack*, 33 U.S. (8 Pet.) 271, 275 (1834) (equitable lien on partnership assets); *Brent v. Bank of Washington*, 35 U.S. (10 Pet.) 596, 615 (1836) (common-law lien on intangible personal property). *Thelusson v. Smith*, 15 U.S. (2 Wheat.) 396 (1817), is not to the contrary. In *Conard*, the Court limited *Thelusson* to its highly unusual facts. *See* 26 U.S. (1 Pet.) at 441-44. Following *Conard* and *Brent*, the Attorney General of the United States issued a formal opinion letter concluding that *Thelusson* "has been distinctly overruled." *Case of Richardson*, 9 Op. Att'y Gen. 28, 29 (1857).

B. 1. In a series of cases involving state tax liens on personal property, this Court has fashioned minimum federal standards for determining whether state-created liens qualify as security interests for purposes of surviving application of the federal priority statute. Although a state's characterization of the relevant interest as secured is not "conclusive," it is still "entitled to weight." *Illinois ex rel. Gordon v. Campbell*, 329 U.S. 362, 371 (1946).

2. The judgment lien in this case satisfies all applicable federal requirements. The lien clearly identifies the lienor, the amount of the lien, and the property subject to the lien. Moreover, it is immediately enforceable by execution.

3. The government mistakenly contends that a judgment lien on real property cannot survive application of the priority statute unless, in addition to satisfying these requirements, it is also reduced to possession. This Court's decisions requiring possession all have involved state tax liens on personal property. *See United States v. Gilbert Assocs.*, 345 U.S. 361, 362 (1953); *Campbell*, 329 U.S. at 365; *United States v. Waddill, Holland & Flinn, Inc.*, 323 U.S. 353, 354 (1945). The Court's decisions in these cases simply incorporate the longstanding common-law requirement that a creditor must possess the security in order to perfect a lien on *personal* property. Judgment liens on *real* property, by contrast, have never required possession as an element of perfection. The government's proposed possession requirement would place at risk all modern security interests, including mortgages. It also would produce, without good reason, significantly different treatment of secured creditors as between the Bankruptcy Code and the priority statute. By permitting the routine destruction of the property rights of secured creditors, it also would raise substantial enough takings concerns to warrant rejection so as to avoid constitutional difficulty. Finally, the government's broad interpretation of the priority statute would bring that statute needlessly into conflict with the Tax Lien Act.

II. Even assuming that the federal priority statute overrides antecedent security interests generally, the specific Tax Lien Act bars such application of the priority statute in the specific context of federal tax claims.

1. The courts below correctly concluded that the government's construction of the priority statute brings that provision into conflict with the Tax Lien Act. In this case, the government would prevail under the priority statute (as construed by the government), but Romani Industries would prevail under Tax Lien Act. The question presented is how to reconcile these overlapping and conflicting statutes.

2. In cases where overlapping statutes conflict, this Court applies the well-settled rule that specific provisions qualify general

ones. That rule applies regardless of the priority of enactment, but has particular force where the later statute is the more specific one. "We should be reluctant," the Court has explained, "to read an earlier statute broadly where the result is to circumvent the detailed remedial scheme constructed in a later statute." *Patterson v. McLean Credit Union*, 491 U.S. 164, 181 (1989). On five occasions, the Court has applied this principle to hold that the priority statute conflicted with, and was therefore qualified by, a subsequently enacted and more specific statute. *Cook County National Bank v. United States*, 107 U.S. 445 (1882) (National Bank Act); *Guarantee Title & Trust Co. v. Title Guaranty & Surety Co.*, 224 U.S. 152 (1912) (Bankruptcy Act); *Davis v. Pringle*, 268 U.S. 315 (1925) (same); *Mellon v. Michigan Trust Co.*, 271 U.S. 236 (1926) (Federal Control Act); *United States v. Guaranty Trust Co.*, 280 U.S. 478 (1930) (Transportation Act of 1920).

3. The courts below correctly concluded that the Tax Lien Act is more specific than, and therefore must qualify, the priority statute. The Tax Lien Act applies only to federal tax claims, and it provides a detailed set of priorities in that specific context. Its carefully crafted scheme would be severely undercut if the priority statute overrides all of these interests in every case involving an insolvent debtor. The government urges the Court to limit the Tax Lien Act priorities to cases where the debtor is not insolvent. That limitation would make the Act virtually meaningless, for the priorities are important only when the debtor *is* insolvent.

4. The legislative history of the Tax Lien Act confirms that the Congress intended for the Act to apply to all tax claims. This Court has recognized that the Act demonstrates Congress' disapproval of unrestricted federal priority for tax claims. The government attributes great significance to Congress' failure to enact two proposals made by the American Bar Association, which would have codified the rules urged here by Romani Industries. But the Court is reluctant to draw inferences from Congress' failure to act. Moreover, because the proposals swept

much more broadly than the disputed issues here, it is impossible to attribute any significance to that failure in this case.

5. Finally, this Court's analysis in *Gilbert Associates* suggests that the Tax Lien Act qualifies the federal priority statute. In *Gilbert Associates*, which involved an insolvent debtor, the Court addressed at length a question under the Tax Lien Act, which could not have arisen if the priority statute were controlling in that situation.

ARGUMENT

I. THE FEDERAL PRIORITY STATUTE DOES NOT OVERRIDE ANTECEDENT JUDGMENT LIENS ON REAL PROPERTY

The Pennsylvania Supreme Court decided this case on the assumption that, but for the Tax Lien Act of 1966, the federal priority statute would override the judgment lien obtained in this case by Romani Industries. That assumption is incorrect. In fact, the priority statute does not override judgment liens on real property, or other traditional security interests, already in existence when the debtor's estate is created.[6] Properly construed, therefore, the priority statute cannot conflict with the security interests specifically protected by the Tax Lien Act, including Romani Industries' judgment lien.

A. The Federal Priority Statute Does Not Override Traditional Security Interests

The text of the federal priority statute, read in light of its historical background, in light of comparable priority provisions in the bankruptcy code, and in light of this Court's decisions,

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[6] Except in cases involving an attachment or "act of bankruptcy," the federal priority cannot arise before the debtor's property has passed to a third party, by death or voluntary assignment, for distribution to creditors. *See, e.g., United States v. Oklahoma*, 261 U.S. 253, 259-60 (1923); *Beaston v. Farmers' Bank of Delaware*, 37 U.S. (12 Pet.) 102, 133 (1838).

cannot be construed to override or abrogate traditional security interests.

1. The federal priority statute originated in the common-law "prerogative of the crown," a longstanding sovereign right to "priority of payment of debts." *United States v. State Bank of North Carolina*, 31 U.S. (6 Pet.) 29, 35 (1832). But just as the royal prerogative was settled, so too were its limitations. In *Marshall v. New York*, 254 U.S. 380, 382 (1920), this Court recognized that the prerogative did not apply to pre-existing security interests, and thus "could be defeated" by liens. In particular, when the federal priority statute was first enacted, a century of common-law precedent had established that judgment liens would survive subsequent assertions of the royal prerogative. *See, e.g., Rorke v. Dayrell*, 4 T.R. 403, 412, 100 Eng. Rep. 1087, 1092 (K.B. 1791) (royal prerogative defeated "where the subject's judgment is prior to the inception of the King's execution"); *The King v. Dickenson*, Parker 262, 263, 145 Eng. Rep. 774, 775 (1692) ("a precedent judgment should be preferred" to the royal prerogative); *Attorney General v. Andrew*, Hadres 22, 26-27, 145 Eng. Rep. 360, 362 (1655) (adopting contention that "[a] judgment is a common security, and ought therefore to be favoured" over the royal prerogative).[7]

These principles endured in the common law of the individual states. As early as 1795, a South Carolina court held that, just as judgment liens and other security interests had been protected

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[7] The common law also protected a wide range of other security interests against subsequent assertions of the royal prerogative, including liens on personal property, *see, e.g., Rex v. Humphrey*, 1823-24 All E.R. 452, 458 (Ex. 1825) (wharfinger's lien); *The King v. Lee*, 6 Price 369, 378, 146 Eng. Rep. 837, 840 (Ex. 1819) ("the Crown could not compel the factors to give up their lien"); mortgages, *see, e.g., Casberd v. Attorney-General*, 6 Price 411, 464, 146 Eng. Rep. 850, 868 (Ex. Ch. 1819) ("if we find that the plaintiffs are equitable mortgagees, of course they are entitled to be paid before the Crown"); and "equitable security," *see Fector v. Philpott*, 12 Price 197, 212, 147 Eng. Rep. 697, 701-02 (Ex. Ch. 1823).

from assertions of the royal prerogative in England, so too were they protected from assertions of the sovereign prerogative of South Carolina. *Commissioners of Public Accounts v. Greenwood*, 1 S.C. Eq. (1 Des.) 450 (1795). As the Illinois Supreme Court later explained, in adopting *Greenwood* as the law of Illinois:

> [T]he state had no prerogative to be paid out of the effects of its debtor in preference to any citizen who had a judgment, mortgage, or other lien. This was not a denial of the succession of the state to the prerogative of priority, for the common law itself made the same exception in the case of the crown that was made in the South Carolina decision.

People v. Farmers' State Bank, 167 N.E. 804, 806 (Ill. 1929). Similarly, the Oregon Supreme Court held that the sovereign prerogative of Oregon, derived from the royal prerogative in England, was a right to priority of payment only against "any one else *not* having an antecedent lien." *United States Fidelity & Guaranty Co. v. Bramwell*, 217 P. 332, 335 (Or. 1923) (emphasis added). *Accord, e.g., Pauley v. California*, 75 F.2d 120, 133 (9th Cir. 1934) (California law) (prerogative applies against "all persons not having antecedent liens"); *Montgomery v. State*, 153 So. 394, 396 (Ala. 1934) (prerogative applies against "all persons not having prior liens"); *State v. Bank of Maryland*, 6 G. & J. 205, 226 (Md. 1834) (prerogative applies where "no lien standing in the way"). *See generally* 3 R. Clark, *A Treatise on the Law and Practice of Receivers* § 669, at 1223-29 (3d ed. 1959).

2. In light of this settled tradition, the government bears a heavy burden to establish that the federal priority statute abrogates centuries of common-law protection — enforceable even against the sovereign — for judgment liens and other security interests. In determining whether statutes abrogate settled common-law principles, this Court has long followed the "well-established principle" that "'[t]he common law . . . ought not to be deemed to be repealed, unless the language of a statute be clear and explicit for this purpose.'" *Norfolk Redev. & Hous. Auth. v. Chesapeake & Potomac Tel. Co.*, 464 U.S. 30, 35 (1983),

quoting *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. (7 Cranch) 603, 623 (1813). Thus, the Court repeatedly has held that, "[i]n order to abrogate a common law principle, [a] statute must 'speak directly' to the question addressed by the common law." *United States v. Texas*, 507 U.S. 529, 534 (1993), quoting *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978). *See also Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991) ("[W]here a common-law principle is well established the courts may take it as given that Congress has legislated with an expectation that the principle will apply except 'when a statutory purpose to the contrary is evident.'" (citations omitted)).

Read with these principles in mind, the federal priority statute clearly does not abrogate the settled common-law protection for judgment liens and other security. In its present form, the priority statute simply provides that "[a] claim of the United States Government" against the estate of an insolvent debtor "shall be paid first." 31 U.S.C. § 3713(a). In its original forms, the statute similarly provided that, for claims against the estate of an insolvent debtor, "the debt due to the United States shall be first satisfied." Act of March 3, 1797, § 5, 1 Stat. 512, 515; *see also* Act of July 31, 1789, § 21, 1 Stat. 29, 42. On its face, the statute establishes only a right to priority of payment: it creates no security interest in favor of the United States, *see United States v. Fisher*, 6 U.S. (2 Cranch) 358, 390 (1805), and it does not address at all — much less "'speak directly'" (*Texas*, 507 U.S. at 534 (quoting *Mobil Oil Corp.*, 436 U.S. at 625)) — to the property rights of other secured creditors.[8]

3. The Bankruptcy Code confirms the traditional understanding that priority provisions do not affect the rights of secured

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[8] Unless specifically addressed to secured claims, priority statutes traditionally have been understood to affect only the rights of unsecured creditors. *See, e.g.*, G. Glenn, *The Law Governing Liquidation* § 510, at 726 (1935); Kennedy, *The Relative Priority of the Federal Government: The Pernicious Career of the Inchoate and General Lien*, 63 Yale L.J. 905, 907-08 (1954).

creditors. The priority provisions in the Code apply only to unsecured claims (11 U.S.C. § 507), with the "determination of secured status" governed by entirely separate rules (*id.* § 506). As a leading treatise explains:

> The priorities granted by section 507 are priorities as against holders of unsecured claims only. The rights of holders of priority claims are subject to the rights of holders of liens against property. *The right to priority does not grant or imply any right to affect the rights of holders of secured claims* and the rights of holders of secured claims may only be affected to the extent authorized by a particular section of the Code.

4 *Collier on Bankruptcy* ¶ 507.02[4][a] (L. King, ed., 15th rev. ed. 1997) (emphasis added).[9] Thus, the Code allows liens to be avoided only in very limited circumstances, and only under provisions specifically addressed to liens as such. *See, e.g.*, 11 U.S.C. § 545 (avoidance of liens by trustee); *id.* § 522(f) (avoidance of liens by debtor).

Bankruptcy has long reflected these fundamental principles. For example, Section 64 of the Bankruptcy Act of 1898 set forth priority provisions for unsecured interests, and Section 67(d) of that Act confirmed that liens would "not be affected" by the priority provisions. *See* Act of July 1, 1898, §§ 64, 67(d), 30 Stat. 544, 563-64. Similarly, the Bankruptcy Act of 1841 set forth a priority provision, and confirmed that it would not "be

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[9] Other commentators echoed that point:

> A "creditor entitled to priority" is a general and unsecured creditor; and were it not for the express provision of the Act, such a creditor would be treated like all other unsecured creditors in the proportionate distribution of funds. . . . "Creditors entitled to priority" are paid their claims out of the free *unencumbered* funds of the estate but ahead of general creditors.

S. Nadler & M. Nadler, *The Law of Bankruptcy* § 182 (2d ed. 1965) (emphasis added).

construed to annul, destroy, or impair . . . any liens, mortgages, or other securities on property, real or personal, which may be valid by the laws of the States respectively." Act of Aug. 19, 1841, ch. 9, § 2, 5 Stat. 440, 442.[10]

Bankruptcy law thus draws fundamental distinctions between secured and unsecured creditors; affords substantial protection to the property rights of secured creditors; and, most significant here, does not disturb those rights by operation of general priority provisions. Those principles should control this case, for the Court repeatedly has recognized that, because the bankruptcy statutes "focus more precisely on the problems of insolvency," they provide an "apt" source of guidance in construing the federal priority statute. *See United States v. Moore*, 423 U.S. 77, 84 (1975).[11]

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[10] Consistent with these provisions, this Court consistently has recognized the special protection afforded to secured claims in bankruptcy. *See, e.g., Farrey v. Sanderfoot*, 500 U.S. 291, 297 (1991) ("Ordinarily, liens and other secured interests survive bankruptcy."); *Gibson v. Warden*, 81 U.S. (14 Wall.) 244, 248 (1871) (rights of trustee "are subordinate to all the prior liens, legal and equitable, upon the property in question"); *Yeatman v. Savings Institution*, 95 U.S. 764, 766 (1877) (trustee takes property "subject to all equities, liens, or encumbrances"); *Norton's Assignee v. Boyd*, 44 U.S. (3 How.) 426, 436 (1845) ("It is quite clear that the liens and mortgages which are valid under state law must be protected . . . in bankruptcy"); *Ex parte Christy*, 44 U.S. (3 How.) 292, 316 (1845) ("no doubt that the liens, mortgages, and other securities . . . are not to be annulled, destroyed, or impaired under the proceedings in bankruptcy"). *See also In re Cook*, 6 F. Cas. 383, 384 (C.C.D. Mass. 1842) (Story, J.) ("the lien of a judgment . . . is wholly unaffected by the proceedings in bankruptcy").

[11] In commercial law as well, it is axiomatic that secured creditors receive payment before unsecured creditors. Under Article 9 of the Uniform Commercial Code, as the leading commentators have noted, a secured creditor has "a prior right over any such unsecured creditor without a lien." J. White & R. Summers, *Uniform Commercial Code* § 24-2, at 1126-27 (3d ed. 1988).

4. a. On at least four separate occasions, this Court unanimously has held, consistent with these principles, that the federal priority statute does not override antecedent security interests. In *United States v. Hooe*, 7 U.S. (3 Cranch) 73, 90 (1805), the Court held that the priority statute does not override a deed of trust held by a creditor "for the security." Speaking through Chief Justice Marshall, the Court reasoned that only a lien could defeat a competing secured interest, and that the priority statute created no such security. *See id.* In *Conard v. Atlantic Insurance Company*, 26 U.S. (1 Pet.) 386, 447 (1828), the Court held that the priority statute did not apply to certain bonds held as "collateral security" for a debt. The Court rejected the government's contention that the unsecured federal priority ("not of itself a lien") could be "still superior to any lien" (*id.* at 440-41), concluding instead that the priority statute creates only "a mere right of prior payment, out of the *general* funds of the debtor." *Id.* at 439 (emphasis added).[12] In *United States v. Hack*, 33 U.S. (8 Pet.) 271, 275 (1834), the Court held that the priority statute did not defeat an equitable lien held on partnership assets held by a partner of the insolvent government debtor.[13] Finally, in *Brent v. Bank of Washington*, 35 U.S. (10 Pet.) 596, 615 (1836), the Court held that the priority statute does not override a common-law lien on intangible personal property. In so doing, the Court stressed that the priority statute is defeated not only by a prior sale of the property at issue, but also by a prior

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[12] The Court subsequently affirmed its reasoning in two related cases. *Conard v. Nicoll*, 29 U.S. (4 Pet.) 291, 305, 310 (1830); *Conard v. Pacific Insurance Co.*, 31 U.S. (6 Pet.) 262, 279-80 (1832). For a summary of the complex history of the *Conard* litigation, see Kennedy, *Relative Priority*, 63 Yale L.J. at 909-10.

[13] At common law, partners held an equitable lien to have partnership assets applied to the debts of the partnership. *See, e.g., Fitzpatrick v. Flannagan*, 106 U.S. 648, 654-55 (1882); *Case v. Beauregard*, 99 U.S. 119, 125 (1878). In *Hack*, the Court held that the priority statute entitled the government to obtain partnership assets only *after*, consistent with the equitable lien, all other partnership debts had been satisfied. *See* 33 U.S. (8 Pet.) at 275-76.

transaction that "approximates to one which merely gives a lien." *Id.* at 612.

Riding circuit in *United States v. Lewis*, 26 F. Cas. 920, 924 (C.C. E.D. Pa. 1875), Justice Strong explained that, under these decisions, the priority statute "does not override any liens upon the debtor's property." Justice Strong noted that the "reason" for this rule was "obvious":

> The claim of the government extends only to that which was the property of the debtor when he became insolvent, and his property is only that, in substance, which remains *after* the satisfaction of liens upon it. His power of disposition extends no farther. The lien is paramount to his right.

Id. (emphasis added). This Court unanimously affirmed that decision. *Lewis v. United States*, 92 U.S. 618 (1875). Similarly, in *Field v. United States*, 34 U.S. (9 Pet.) 182 (1835), a district court held that, under *Conard*, the priority statute does not override competing secured claims:

> "It is to the unencumbered estate of the insolvent, divested of any pre-existing lien, that they must look for priority of payment, for, having no lien themselves on their debtor's property while it is under his own control, they cannot reach it in the hands of others, who have an implied right to it in case of the non payment of the debt for which it is security."

See id. at 197 (quoting opinion below). In reversing the district court's judgment in favor of the United States, on grounds not relevant here, this Court expressed no disagreement with that analysis.

b. Against all of this authority, the government relies on *Thelusson v. Smith*, 15 U.S. (2 Wheat.) 396 (1817), which it characterizes as having "held" that the priority statute applies "even when a competing creditor possesses a valid and enforceable judgment lien." Pet. Br. 14. *Thelusson* did state, as the government explains, that the priority statute "makes no exception in favour of prior judgment creditors." 15 U.S. (2 Wheat.) at

425. Subsequently, however, the Court limited *Thelusson* to its facts and specifically disavowed the broad holding attributed to it by the government.

In *Conard*, the Court explained at length that *Thelusson* "turned upon its own particular circumstances," and had been "greatly misunderstood." *See* 26 U.S. (1 Pet.) at 441-44.[14] In *Thelusson*, judgment creditors sued a marshal for the proceeds of an adverse execution by the government. In that context, the Court explained, the judgment creditors could prevail only if they had previously acquired *title* to the property at issue, not because the priority statute would defeat any lesser property interest, but because their lien remained attached to the *property* itself (which was still secured), as opposed to the *proceeds* from its sale (which were unsecured). *See Conard*, 26 U.S. (1 Pet.) at 445 [sic 443]-44.[15] The Court in *Conard* emphatically disavowed any suggestion in *Thelusson* that the priority statute "cut[s] out the lien" of a first-in-time security interest that is "perfect, independent of possession," but not yet reduced to possession. *See id.* at 442.

Following *Conard* and *Brent*, the Attorney General of the United States issued a formal opinion letter concluding that *Thelusson* "has been distinctly overruled, and by the later cases it seems to be well settled that the priority of the United States will not reach back over any lien, whether it be general or

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[14] Justice Story's opinion for the Court in *Conard* was joined by five of the seven Justices who had participated in *Thelusson*, including Justice Washington, who authored both the circuit court decision in *Thelusson* and, in the same opinion, the decision of this Court affirming himself (*see* 15 U.S. (2 Wheat.) at 426).

[15] Thus, the plaintiff judgment creditors in *Thelusson* could have prevailed if they had made a subsequent levy against the property — which would have defeated even the *security* interest arising out of the government's last-in-time judgment lien. *See* 26 U.S. (1 Pet.) at 445 [sic 433] (property "may be levied upon" by junior creditor "who is entitled to hold it against every other person *except such judgment creditor*" (emphasis added)).

specific." *Case of Richardson*, 9 Op. Att'y Gen. 28, 29 (1857). *Accord, e.g., Cottrell v. Pierson*, 12 F. 805, 807 (C.C.D. Neb. 1881) (*Conard* "overruled" *Thelusson*); *Postmaster General v. Robbins*, 19 F. Cas. 1126, 1127 (D. Me. 1829) (*Conard* limited *Thelusson* to "its own particular circumstances"); *Muniz v. United States*, 155 N.E.2d 140, 145 (Ind. Ct. App. 1958) (in banc) (*Conard* "overruled" *Thelusson*).

Like the relevant history and bankruptcy provisions, this Court's decisions confirm that the priority statute does not override traditional security interests.

B. A Judgment Lien On Real Property Qualifies As A Traditional Security Interest

1. In a series of cases involving state tax liens on personal property, this Court has fashioned minimum federal standards for determining whether state-created liens qualify as security interests for purposes of surviving application of the federal priority statute. The Court has recognized that it is ultimately "a matter of federal law" whether state-created security interests displace a priority afforded under a federal statute. *United States v. Waddill, Holland & Flinn, Inc.*, 323 U.S. 353, 356-57 (1945). At the same time, however, the Court has attempted to accommodate state law where possible, and to avoid imposing an entirely federalized body of security law. Thus, a state's characterization of the relevant interest as secured, although not "conclusive," is still "entitled to weight." *Illinois ex rel. Gordon v. Campbell*, 329 U.S. 362, 371 (1946). The Court's approach to the priority statute is thus consistent with its approach to other federal statues, where it likewise has permitted state law — within a range of "permissible variations" — to govern questions not directly addressed by the statute. *DeSylva v. Ballentine*, 351 U.S. 570, 580-81 (1956) (definition of "children" under Copyright Act); *see, e.g., Barnhill v. Johnson*, 503 U.S. 393, 398 (1992) (definition of "property" under Bankruptcy Code); *Kamen v. Kemper Financial Services, Inc.*, 500 U.S. 90, 98-99 (1991) (nature of demand requirement for derivative action under Investment Companies Act); *United States v. Kimbell Foods*, 440

U.S. 715, 736 n.37 (1979) (consensual lien priorities under Small Business Act). Not surprisingly, the "permissible variations" in state law include those laws consistent with "ordinary usage." *See De Sylva*, 351 U.S. at 581.

2. The judgment lien in this case satisfies all of the federal requirements imposed by this Court for a state-created lien to survive application of the priority statute. In *Campbell*, this Court held that such a lien must be "definite" with respect to "(1) the identity of the lienor, (2) the amount of the lien, and (3) the property to which it attaches." 329 U.S. at 375 (citations omitted). Moreover, in *New York v. Maclay*, 288 U.S. 290, 294 (1933), the Court held that such a lien also must be "presently enforcible." The judgment lien in this case clearly identifies both the lienor (Romani Industries) and the amount of its lien ($400,000). Pet. App. 2a. Moreover, it applies only to Mr. Romani's real property located in Cambria County, Pennsylvania. *Id.*; 42 Pa. Cons. Stat. Ann. § 4303(a). Its identification of the encumbered property is thus far more precise than the descriptions held impermissibly vague in *Campbell*, which involved a state tax lien on all personal property "used by [the debtor] in connection with his trade, occupation, profession or business," *see* 329 U.S. at 372, 375-76, and in *United States v. Texas*, 314 U.S. 480, 484 (1941), which involved a state tax lien on all property "devoted to or used in [the debtor's] business as a distributor." Finally, unlike the state tax lien at issue in *Maclay*, the judgment lien here was immediately enforceable by execution. *See* Pa. R. Civ. P. 3103.

3. The government contends that no lien may survive application of the priority statute unless, in addition to satisfying the minimum federal requirements addressed above, it is also reduced to possession. Pet. Br. 15 & n.5. That position is unwarranted as a matter of precedent, history, and common sense.

a. In its more recent decisions addressing the priority statute, this Court often has mentioned a requirement that liens be reduced to possession. Every case that actually turned on that requirement, however, involved a state tax lien on *personal* property.

See United States v. Gilbert Assocs., 345 U.S. 361, 362 (1953); *Campbell*, 329 U.S. at 365; *Waddill*, 323 U.S. at 354.[16] In deeming such liens to be perfected without possession, the states in these cases had abrogated venerable common-law principles. With respect to liens on personal property, the requirement that a creditor "take possession of his collateral" in order to perfect the security interest "dates from the beginning of legal history." 1 G. Gilmore, *Security Interests in Personal Property* § 14.1, at 438 (1965). Liens on personal property remaining in the debtor's possession were completely "unknown" at common law, and indeed were considered "fraudulent." *See id.* § 2.1, at 24; *Twyne's Case*, 3 Co. Rep. 806, 812-13 & n.(c) (Star Chamber 1601).[17] Against this backdrop, the Court's possession requirement, applied to state tax liens on personal property, reflects simply an affirmation of traditional common-law rules, federalized so as "to

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[16] *Waddill* also involved a landlord's lien on personal property. *See* 323 U.S. at 356. Of the other cases cited by the government (Pet. Br. 15 & n.5), *United States v. Vermont*, 377 U.S. 351 (1964), involved construction of the Tax Lien Act; *United States v. Texas* involved a state tax lien on personal property for an uncertain amount (*see* 314 U.S. at 487); *Maclay* involved a state tax lien that was not "presently enforceable" (*see* 288 U.S. at 294); and *County of Spokane v. United States*, 279 U.S. 80, 94-95 (1929), involved a state tax lien on personal property that was not perfected even as a matter of state law.

[17] Outside the context of regulating their own tax liens, the states retained the common-law rule that possession is necessary in order to create a lien on personal property. *See, e.g., Wright v. Terry*, 2 So. 6, 9 (Fla. 1887) ("exclusive legal possession is an essential element of a common-law lien on personal property"); *Warren v. First National Bank*, 38 N.E. 122, 129 (Ill. 1893) ("to obtain such lien the factor must have the goods lawfully in his possession"); *Muniz*, 155 N.E.2d at 147 (Indiana law) ("Neither a judgment nor a state tax is a lien on *personal property* until a levy has been made.") (emphasis in original); *Deeley v. Dwight*, 30 N.E. 258, 258 (N.Y. 1892) ("possession by the lienor of chattels on which the lien is claimed is indispensable to support a common-law lien"); *Jordan, Ellis & Co. v. L. & J. James*, 5 Ohio 88, 98 (1831) ("It is essential to liens, that persons claiming them have the possession of the chattel upon which they are claimed to operate.").

prevent States from 'undercutting'" a federal statute with arbitrary, novel, and self-serving rules (*Kimbell Foods*, 440 U.S. at 736 n.37).[18]

The relevant considerations are entirely different, however, with respect to judgment liens on real property. Most importantly, those interests are traditional. As the Pennsylvania Supreme Court has noted, judgment liens on real property "are the product of centuries of statutes." *In re Upset Sale*, 479 A.2d 940, 943 (Pa. 1984). In England, judgment liens on real property have existed at least since the Statute of Westminster II of 1285, 13 Ed. 1, c. 18 (1285), 1 Stat. Realm 82 (1810). *See* Riesenfeld, *Enforcement of Money Judgments in Early American History*, 71 Mich. L. Rev. 691, 694 (1973). And as Chief Justice Marshall explained long ago, judgment liens on real property — like mortgages, and unlike liens on personal property — traditionally were perfected without acquiring possession. *See Rankin & Schatzell v. Scott*, 25 U.S. (12 Wheat.) 177, 179 (1827).[19] These principles also enjoy widespread continuing support among the states. *See, e.g.*, 5 R. Powell & P. Rohan, *Powell on Real Property* § 38.02[2], at 38-6 (1997) ("Generally the docketing of

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[18] The possibility of such manipulation of state security definitions appears especially likely in *Gilbert Associates*, where a state court had characterized machinery as "real estate," and an assessment as a "judgment," for purposes of its own tax enforcement scheme. *See Petition of Gilbert Assocs.*, 90 A.2d 499, 501-02 (N.H. 1952), *rev'd*, 345 U.S. 361 (1953). Not surprisingly, this Court held that those characterizations did not bind it for federal law purposes.

[19] Applying security and first-in-time principles "believed to be universal," the Court in *Rankin & Schatzell* held that a judgment lien creditor could execute on property already executed upon by a junior judgment lien creditor. *See* 25 U.S. (12 Wheat.) at 177-78. In analogizing judgment liens to mortgages, the Court explained that a judgment lien "is as binding as a mortgage, and has the same capacity to hold the land so long as the statute preserves it in force." *Id.* at 179. And in distinguishing judgment liens from "executions against personal property," the Court explained that in personal property cases, "the lien is not created by the judgment." *See id.*

the judgment gives the judgment creditor a lien on all of the judgment debtor's real property in the county of docketing or recording."). Moreover, Congress itself has recognized state-created judgment liens as an appropriately protected category of security interest. *See, e.g.*, 26 U.S.C. § 6323(a) (protection under Tax Lien Act); 42 U.S.C. § 9607(*l*)(3) (protection under CERCLA). Finally, because judgment liens are broadly applicable interests that primarily benefit private parties, there is little reason to fear that the States will manipulate their doctrines in this area — unlike in the area of state tax liens — either to further their own interests or to retard federal interests inappropriately. For all of these reasons, there is no basis for this Court to create a federal common-law rule that judgment liens, for purposes of the priority statute, are not perfected unless and until they are reduced to possession.

b. The breadth of the government's "title or possession" theory (Pet. Br. 15 & n.5) also would present significant practical problems. Most significantly, it would gravely destabilize all modern security interests — including mortgages. The government's suggestion that mortgages could survive application of the priority statute under its proposed theory (Pet. Br. 15 n.5) is at best doubtful. With regard to title: Although the common law regarded a mortgagor as holding title to the property at issue, approximately 30 states now regard the mortgagor as holding only a lien on the property, with the mortgagee retaining actual title. *See, e.g.*, 4 R. Powell, *Powell on Real Property* ¶ 439, at 37-10 to 37-13 (1997); G. Nelson & D. Whitman, *Real Estate Finance Law* 150-59 (3d ed. 1993). Thus, all mortgages in the so-called "lien theory" states would be at risk. Nor would the possession element of the government's theory reduce that risk. Under the "lien theory" of mortgages, the mortgagee by definition retains the right of possession (until default). And even in the "title

theory" states, the mortgagee generally retains that right, either by statute or by agreement of the parties. *See, e.g., id.* at 153.[20]

The government's theory also would produce sharply different treatment of secured creditors as between the Bankruptcy Code and the priority statute.[21] As explained above, the Code contains no provision that would allow unsecured creditors to frustrate the claims of secured creditors. Under the government's theory, however, the priority statute would defeat secured claims whenever the secured party had failed to perfect *and execute* (thus reducing to possession) its security interest before the federal priority had attached. There is no conceivable justification for a judge-made rule to produce that result, which would create perverse incentives for secured creditors to drive possibly insolvent debtors, willingly or unwillingly, into bankruptcy.[22]

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[20] So far, the lower courts have managed to resist the government's attempts to expand the scope of the priority statute to override even mortgages. *See, e.g., Southern Ry. Co. v. United States*, 306 F.2d 119, 126 (5th Cir. 1962) (priority statute "gives way to a valid recorded first mortgage"). The lower courts even have held that a wide variety of *unsecured* claims survive application of the priority statute, including claims for an estate's administrative expenses, *e.g., Abrams v. United States*, 274 F.2d 8, 12 (8th Cir. 1960); for funeral expenses of the deceased debtor, *e.g., Martin v. Dennett*, 626 P.2d 473, 475 (Utah 1981); and for spousal and family allowances, *e.g., Schwartz v. Commissioner of Internal Revenue*, 560 F.2d 311, 314-15 n.7 (8th Cir. 1977).

[21] In 1978, Congress expressly excluded the priority statute from application in bankruptcy proceedings. *See* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, tit. III, § 322(a), 92 Stat. 2678, codified at 31 U.S.C. § 3713(a)(2).

[22] As one prominent commentator in this area has noted, discrepancies between the bankruptcy rules and the insolvency rules would give secured creditors "a distinct incentive to throw into bankruptcy a debtor whose case might have been handled, with less expense and less burden on the federal courts, in another form of proceeding." Plumb, *Federal Liens and Priority*, 77 Yale L.J. 228, 242 (1967). That problem is exacerbated because, "unless the accident of death makes the choice for them," creditors generally may "substitute a federal bankruptcy proceeding for any collective action" to which the priority statute is applicable. W. Plumb, *Federal Tax Liens* 199-200 (3d ed. 1981).

Moreover, cases involving decedents' estates — which are ineligible for bankruptcy precisely because of congressional solicitude for traditional state-law probate, *see In re Goerg*, 844 F.2d 1562, 1566 (11th Cir. 1988) — would be governed by a *more* intrusive federal rule of decision about the respective rights of the United States against secured creditors.

c. By permitting the routine destruction of the property rights of secured creditors, the government's broad "title or possession" theory also would create substantial constitutional difficulties. In *Armstrong v. United States*, 364 U.S. 40, 44 (1960), this Court held that federal action destroying all value of certain liens constituted a Fifth Amendment taking.[23] The Court in *Armstrong* explained that there was no basis for distinguishing, at least for takings purposes, the liens at issue there from the mortgage also held compensable in *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935). Since *Armstrong*, the Court has broadly expanded the category of non-fee interests entitled to Takings Clause protection, *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984); has held that mortgage interests are protected property for Due Process purposes, *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983); and has held that the destruction of all economic value, at least with respect to fee interests, constitutes a *per se* taking, *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

On another occasion, this Court construed the Bankruptcy Code so as to avoid the takings concerns that would be presented by the destruction of a lien. *United States v. Security Industrial Bank*,

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[23] The value of the liens in *Armstrong* was destroyed because the government had exercised its contract right to acquire certain encumbered property from a contractor. As a result, the liens became unenforceable by virtue of sovereign immunity. *See* 364 U.S. at 46.

459 U.S. 70 (1982).[24] The Court stressed the constitutional "difficulty" that arises when federal power is "used to defeat traditional property interests" such as liens. *Id.* at 75. Quoting from *Armstrong*, the Court reiterated that the "'total destruction'" of "'all value of these liens'" would constitute a compensable taking. *Id.* at 77. Similar concerns are present in cases like this one, where application of the priority statute would destroy the entire value of the property interest held by Romani Industries. Accordingly, the Court should invoke the "'cardinal principal'" of interpreting the priority statute so as to avoid the constitutional question. *Lorillard v. Pons*, 434 U.S. 575, 577 (1978), quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932). In this case, such an interpretation is not only possible, but also correct.

d. Finally, the government's broad interpretation of the priority statute would bring that statute into conflict with the Tax Lien Act in circumstances where, as here, the Tax Lien Act specifically protects the private security interest at issue. As we explain below, any such conflict must be resolved in favor of the specific provisions of the Tax Lien Act and against the general provisions of the priority statute. Nonetheless, avoidance of such a conflict in the first instance provides yet another reason to construe the priority statute as establishing for the government only a first priority as among unsecured creditors.

II. THE TAX LIEN ACT PREVENTS APPLICATION OF THE PRIORITY STATUTE IN THE SPECIFIC CONTEXT OF FEDERAL TAX CLAIMS

Even assuming that the federal priority statute overrides antecedent security interests generally, the priority statute cannot be applied to abrogate security interests specifically protected by the Tax Lien Act.

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[24] In order to minimize possible takings concerns, the Court construed 11 U.S.C. § 552(f)(2), which permits individual debtors to avoid certain liens, so as not to apply retroactively to property rights created prior to its enactment. *See* 459 U.S. at 73-78.

1. The courts below correctly concluded that the priority statute, as construed by the government, overlaps and conflicts with the Tax Lien Act. This case demonstrates that conflict. Applying only the priority statute (as construed by the government), the government would be "paid first" even though Romani Industries' competing claim is secured. 31 U.S.C. § 3713(a). On the other hand, applying only the Tax Lien Act, the government's tax lien would "not be valid" against Romani Industries' first-in-time judgment lien, and Romani Industries' secured claim would then prevail against the government's competing unsecured claim. 26 U.S.C. § 6323(a). The result in the case thus "differs" depending on which statute is applied. Pet. App. 6a. Thus, the question presented is not simply whether the government would prevail under the priority statute considered in isolation (Pet. Br. 16-17), but how to reconcile the priority statute with the Tax Lien Act in the considerable range of cases where the former statute (as construed by the government) conflicts with the latter.

2. a. In cases where overlapping statutes conflict, this Court's approach is well-settled: Absent a clearly expressed congressional intent to the contrary, "specific provisions qualify general ones." *Robertson v. Seattle Audubon Society*, 503 U.S. 429, 440 (1992). Although this principle applies "regardless of the priority of enactment," *Morton v. Mancari*, 417 U.S. 535, 551 (1974), it has particular force where the later statute is the more specific one. "We should be reluctant," the Court has explained, "to read an earlier statute broadly where the result is to circumvent the detailed remedial scheme constructed in a later statute." *Patterson v. McLean Credit Union*, 491 U.S. 164, 181 (1989) (specific provisions of Title VII qualify general provisions of 42 U.S.C. § 1981); *see, e.g., Seattle Audubon Society*, 503 U.S. at 439-40 (specific provisions of Northwest Timber Compromise qualify general provisions of Migratory Bird Treaty Act); *Jett v. Dallas Indep. School Dist.*, 491 U.S. 701, 734 (1989) (specific provisions of 42 U.S.C. § 1983 qualify general provisions of 42 U.S.C. § 1981); *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 438 (1989) (specific provisions of Foreign

Sovereign Immunities Act qualify general provisions of Alien Tort Statute); *United States v. Fausto*, 484 U.S. 439, 453 (1988) (specific provisions of Civil Service Reform Act qualify general provisions of Back Pay Act and Tucker Act). A statute is "specific" for these purposes if it is either narrower, *e.g.*, *Traynor v. Turnage*, 485 U.S. 535, 548 (1988); *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976), or more detailed, *e.g.*, *Jett*, 491 U.S. at 734; *Amerada Hess*, 480 U.S. at 438, than the competing statute. By construing specific statutes to qualify general ones, the Court accomplishes the "classic judicial task of reconciling many laws enacted over time, and getting them to 'make sense' in combination." *Fausto*, 484 U.S. at 453.

Closely related to this rule is the presumption against implied repeals. Where a specific statute conflicts with a later and more general statute, the Court has applied the presumption against implied repeals to reinforce the rule that a specific statute (enacted earlier) qualifies a general one (enacted later). *See, e.g.*, *Traynor*, 485 U.S. at 547-48; *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 442, 445 (1987); *Radzanower*, 426 U.S. at 153-55; *Morton v. Mancari*, 417 U.S. at 549-51. But where a specific statute conflicts with an *earlier* and more general statute, thus bringing the presumption against implied repeals into conflict with the rule that specific provisions qualify general ones, the Court repeatedly has applied the rule that specific provisions qualify general ones, and repeatedly has refused to apply the presumption against implied repeals. *See, e.g.*, *Amerada Hess*, 488 U.S. at 438; *Fausto*, 484 U.S. at 453.[25]

[25] The Court also applies the presumption against implied repeals to reinforce the principle that statutes should be construed, if possible, so as not to conflict with one another. *See, e.g.*, *Rodriguez v. United States*, 480 U.S. 522, 524 (1987 (per curiam); *Silver v. New York Stock Exchange*, 373 U.S. 341, 357 (1963). As explained above, that principle supports construing the priority statute to afford the government first priority only among unsecured creditors.

Finally, where overlapping statutes conflict and it is impossible to characterize one or the other as more specific, yet another rule of construction governs: a more recent statute qualifies a less recent one. *See, e.g.*, *Watt v. Alaska*, 451 U.S. 259, 266 (1981); 2A C. Sands, *Sutherland on Statutes and Statutory Construction* § 51.02 (4th ed. 1973); T. Sedgwick, *The Interpretation and Construction of Statutory and Constitutional Law* 104 (2d ed. 1874).

b. This Court repeatedly has applied these principles in cases involving the federal priority statute. On at least five separate occasions, the Court unanimously has held that the priority statute conflicted with — and was therefore qualified by — subsequently enacted and more specific statutes. In *Cook County National Bank v. United States*, 107 U.S. 445, 448-51 (1882), the Court held that the National Bank Act, which set forth a comprehensive "system for the establishment and government of national banks" (*id.* at 448), barred application of the priority statute to federal claims against such banks. In *Guarantee Title & Trust Co. v. Title Guaranty & Surety Co.*, 224 U.S. 152, 159-60 (1912), and *Davis v. Pringle*, 268 U.S. 315, 317-18 (1925), the Court held that the priority provisions of the Bankruptcy Act barred application of the priority statute in bankruptcy cases.[26] In *Mellon v. Michigan Trust Co.*, 271 U.S. 236, 238-40 (1926), the Court held that the Federal Control Act barred application of the priority statute to government claims on behalf of railroads subject to federal control. Although the Federal Control Act contained no provision directly inconsistent with the priority statute, the Court concluded that application of the priority statute "would conflict with the spirit and broad purpose" of the later

[26] When these cases were decided, the literal text of the priority statute encompassed bankruptcy cases. Congress made the exclusion explicit only in 1978. *See* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, tit. III, § 322(a), 92 Stat. 2678, codified at 31 U.S.C. § 3713(a)(2).

Act. *Id.* at 240.[27] Finally, in *United States v. Guaranty Trust Co.*, 280 U.S. 478 (1930), the Court held that the Transportation Act of 1920, which comprehensively regulated the indebtedness of certain railroads to the federal government, barred application of the priority statute to claims arising under that Act. Although the Transportation Act created no distinctive priority provisions, the Court, speaking through Justice Brandeis, concluded that application of the priority statute "would have defeated the purpose" of the Act. *Id.* at 485.

Not surprisingly, the government cites no case in which this Court has held that the priority statute qualifies a later and more specific statute with which it is inconsistent. Neither *United States v. Key*, 397 U.S. 322 (1970), nor *United States v. Emory*, 314 U.S. 423 (1941), supports that remarkable proposition. In *Key*, the Court held that the priority statute is entirely consistent with a provision requiring a "fair and equitable" distribution to certain competing creditors. *See* 397 U.S. at 327. In *Emory*, the Court held that the priority statute is entirely consistent — in *non*-bankruptcy cases — with the bankruptcy priority provisions. *See* 314 U.S. at 427-28 & n.4. Those cases involved no inconsistency between the priority statute and any other provision. Accordingly, the cases did not even address, much less modify, the well-settled principles for determining the interaction of overlapping and inconsistent statutory provisions.[28]

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[27] In pertinent part, the Federal Control Act simply prohibited the federal government, in defending suits brought by third parties against controlled railroads, from defending on the ground that the railroads were an "instrumentality or agency" of the government. *See* 271 U.S. at 238.

[28] In the Pennsylvania Supreme Court, the government acknowledged that "'general rules of construction suggest that the broad mandate of [the priority statute] should yield to the specific priorities prescribed by the tax lien legislation.'" Brief for Appellant, *In re Estate of Francis J. Romani*, No. 0059 W.D. Appeal Docket 1995, at 26 (filed Jan. 29, 1996) (citation omitted). Nonetheless, the government argued that *Key* had established a separate canon of "special deference" to the priority

3. a. The courts below correctly concluded that the Tax Lien Act is more specific than, and therefore must qualify, the priority statute. The Tax Lien Act, which applies only to federal tax claims, is obviously narrower than the priority statute, which on its face applies to all federal claims without limitation. Indeed, this Court repeatedly has described the priority statute as "broad and sweeping," *Waddill*, 323 U.S. at 355, and as a "generalized statut[e] giving the United States priority in a wide range of situations," *United States v. Randall*, 401 U.S. 513, 517 (1971). The Tax Lien Act is also far more detailed than the priority statute. Whereas the priority statute provides only that certain federal government claims "shall be paid first," 31 U.S.C. § 3713(a), the Tax Lien Act comprehensively regulates the priority of interests competing against federal tax liens. For example, the Tax Lien Act defines four categories of interests that compete against federal tax liens on a first-in-time basis (26 U.S.C. § 6323(a), App. 2a), ten categories of interests that prevail even against a first-in-time federal tax lien (26 U.S.C. § 6323(b), App. 2a-5a), three categories of interests that prevail against a first-in-time federal tax lien if they also receive certain protections as a matter of state law (26 U.S.C. § 6323(c), App. 5a-8a), and a distinct set of priorities for interests competing against estate and gift tax liens (26 U.S.C. §§ 6324, 6324A, 6324B, App. 17a-24a). This carefully crafted scheme would be gravely undercut if, as the government contends, the priority

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statute. *Id.* In this Court, the government makes the same contention more obliquely, by arguing that the priority statute should qualify the Tax Lien Act (and not vice versa) — even if the later Tax Lien Act conflicts with and is more specific than the earlier priority statute — as long as an unconditional application of the priority statute would not "deprive the [Tax Lien Act] of *any* meaning." Pet. Br. 18 (emphasis added). Nothing in *Key* or *Emory* supports that proposition, which is inconsistent not only with this Court's general rules of construction, but also with specific decisions, including *Cook County National Bank*, *Mellon*, and *Guaranty Trust Co.*, applying those rules of construction to the priority statute.

statute overrides *all* of these interests in *every* case (outside of bankruptcy) involving an insolvent debtor.

b. The government contends that, even if the priority statute overrides the Tax Lien Act "in cases involving insolvents," the Tax Lien Act still has meaningful application in non-insolvency cases. Pet. Br. 22. Insolvency, however, is precisely where the Tax Lien Act priorities are the most significant. As the Pennsylvania Supreme Court explained in this case, those priorities "would be essentially meaningless" if the federal priority statute "always prevailed" when the debtor was insolvent, for "[t]he question of priorities is wholly or largely academic, unless the debtor is insolvent." Pet. App. 11a n. 16 (quoting *H.B. Angsten & Sons*, 388 F.2d at 161 (Haynsworth, C.J., concurring)). And as that court explained long ago, limiting the Tax Lien Act priorities to cases involving solvent debtors "would be quite unreasonable, since there could be no need or reason for such legislation if intended to provide merely for relative priorities in the distribution of assets of solvent debtors." *In re Decker's Estate*, 49 A.2d 714, 720 (Pa. 1946), *cert. denied*, 331 U.S. 807 (1947).[29] Moreover, even if there were some small

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[29] Others also have noted the implausibility of the government's proposed limitation of the Tax Lien Act priorities to cases involving solvent debtors. *See, e.g., In re Meyer's Estate*, 48 A.2d at 213 ("It is only when the funds are not sufficient to pay all claims, that the question of priority becomes of real interest, and it was that situation that moved Congress to give added protection to judgment creditors."); Plumb, *The Federal Priority in Insolvency: Proposals for Reform*, 70 Mich. L. Rev. 1, 9 (1971) (government's position would nullify "the hard-won and much-needed protections provided for secured creditors and certain lienors by the Federal Tax Lien Act" in "the very circumstance in which those protections would become of crucial importance"); Note, Nesbitt v. United States: *Denying an Implied Tax Lien Exception to the Federal Priority in Insolvency*, 33 Cath. U. L. Rev. 741, 744 (1984) (government's position would impose "a tax lien variation of 'Catch-22': the priority accorded . . . by the tax lien legislation is only effective in the distribution of assets of a solvent debtor -- in which case, the issue of priority is wholly academic as the debtor is capable of satisfying all

class of cases where the Tax Lien Act priorities would matter even though the debtor was solvent, the government's proposed limitation of those priorities would largely "circumvent the detailed remedial scheme constructed in" the Tax Lien Act (*Patterson*, 491 U.S. at 181), and thereby "conflict with the spirit and broad purpose" of that Act (*Mellon*, 271 U.S. at 240). That alone establishes that the Tax Lien Act qualifies, and is not qualified by, the earlier and more general federal priority statute.[30]

The government also notes that the priority statute applies based only on a government "claim" (Pet. Br. 22), whereas the Tax Lien Act affords protection only against a government "lien" (Pet. Br. 20). That distinction suggests a possibly alternative theory that, in insolvency cases, the Tax Lien Act operates to eliminate the government's *secured* interest (as reflected in the tax lien), but the priority statute enables the government to prevail on its *unsecured* interest (as reflected in the underlying tax debt). But that account does not eliminate the fundamental structural flaw in the government's position: that the priority statute operates to render ineffective the subsequently enacted and more specific Tax Lien Act priorities in the vast majority of cases where those priorities could even possibly be significant. Moreover, it suffers an additional substantive flaw as well. As a leading commentator has explained: "It is paradoxical that the federal government should stand in a better position as an unsecured creditor than as a secured creditor — a result which can hardly have been contemplated by those who drafted and sponsored the federal tax lien statute." Kennedy, *From* Spokane

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claims against him").

[30] The government suggests that because the definition of insolvency for purposes of the priority statute is idiosyncratically small, the Tax Lien Act priorities, under its theory, would continue to apply to a significant class of non-insolvency cases. Pet. Br. 22-23. In fact, however, the definition of insolvency for purposes of the priority statute tracks the traditional definition of insolvency for bankruptcy purposes. *See Key*, 397 U.S. at 328 n.7.

County *To* Vermont: *The Campaign of the Federal Government Against the Inchoate Lien*, 50 Iowa L. Rev. 724, 744 (1965).

4. The legislative history of the Tax Lien Act and its predecessors confirms that the Congress intended for the Act to apply to all tax claims, even where the debtor is insolvent.

a. In *Kimbell Foods, Inc.*, this Court recognized that the Tax Lien Act clearly demonstrates "Congress' disapproval of unrestricted federal priority" for tax claims. *See* 440 U.S. at 738. That disapproval began in 1913, when Congress specifically gave first-in-time judgment creditors, among others, priority over the lien securing a federal tax claim. *See* Act of Mar. 4, 1913, ch. 166, 37 Stat. 1016. The Committee Report for the 1913 statute broadly stated that the government should "occupy the same position with reference to liens on property as does the individual." H.R. Rep. No. 62-1018, at 2 (1912). Over the next several decades, Congress repeatedly expanded the protections afforded to private creditors competing against government tax claims. *See, e.g.*, Kennedy, *The Relative Priority of the Federal Government: The Pernicious Career of the Inchoate and General Lien*, 63 Yale L.J. 905, 922 n.104 (1954). Finally, in 1966, Congress substantially amended the tax lien statute to afford even greater and more comprehensive protection to such private creditors. *See* Pub. L. No. 89-719, 80 Stat. 1125 (1966). The legislative history specifically stated that the 1966 amendments were designed to "conform the lien provisions of the internal revenue laws to the concepts developed in this Uniform Commercial Code," S. Rep. No. 89-1708, at 2 (1966), *reprinted in* 1966 U.S.C.C.A.N. 3722, 3722, under which secured creditors prevail against unsecured creditors, *see supra* note 11.

b. The government attributes great significance to Congress' failure to enact two proposals made by the American Bar Association in 1959 and 1970 respectively. Pet. Br. 26-28. This Court, however, is "'reluctant to draw inferences from Congress' failure to act.'" *Brecht v. Abrahamson*, 507 U.S. 619, 632 (1993), quoting *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 306 (1988). *See also United States v. Wells*, 117 S. Ct.

921, 929 (1997) ("'"at best treacherous"'" to find congressional silence controlling (citations omitted)). Moreover, congressional inaction is particularly insignificant here, where the ABA proposals would have changed existing law far beyond any question presented in this case. Among other things, the 1959 proposal would have provided (i) that the priority statute does not override security interests specifically protected by the Tax Lien Act, (ii) that the priority statute does not override any other antecedent security interests, and (iii) that the government would have only a *sixth* priority, even in insolvency proceedings and even among unsecured creditors. *See* American Bar Association, *Final Report of the Committee on Federal Liens* 121-22 (1959) (hereafter "ABA Final Report"), *reprinted in* Staff of House Comm. on Ways and Means, *Legislative History of H.R. 11256*, at 239-40 (1966) (hereafter "Legislative History"). The 1970 proposal would have gone even farther. In addition to all of the provisions mentioned above, the 1970 amendment also would have (iv) eliminated the federal priority *in its entirety* for all non-tax claims. *See* Plumb, *The Federal Priority in Insolvency: Proposals for Reform*, 70 Mich. L. Rev. 1, 10 n.53 (1971). Even if the entire Congress had rejected the ABA proposals — which it did not — there would still be no basis to infer that Congress disapproved either of the first two provisions mentioned above, which are at issue in this case, or only one or more of the last two provisions, which are not at issue here.[31]

5. Finally, this Court's analysis in *Gilbert Associates*, although not directly controlling, strongly suggests that the Tax Lien Act qualifies the federal priority statute, and not vice versa, in cases

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[31] With respect to the questions at issue in this case, the ABA appears to have viewed its proposals as confirming, rather than modifying, existing law. The 1959 proposal would have "assured," contrary to "suggestions" made in "some" decisions, that the priority statute would not override existing liens. *See* ABA Final Report, at 124, *reprinted in* Legislative History, at 242. The 1970 proposal was designed "partly to clarify" that the priority statute does not override existing liens. *See* Plumb, *Federal Priority in Insolvency*, 70 Mich. L. Rev. at 10 n.53.

involving tax claims against insolvent debtors. As explained above, *Gilbert Associates* held that a state tax lien was unsecured, for purposes of the priority statute, because the state had not satisfied the common-law requirement of obtaining possession of the personal property at issue. *See* 345 U.S. at 365. Before reaching that decision, however, the Court addressed at length whether the state also was a secured judgment creditor for purposes of the Tax Lien Act (*see id.* at 362-65) — an analysis that would be entirely superfluous if, as the government contends, the priority statute overrides all of the security interests protected by the Tax Lien Act in all cases where, as in *Gilbert Associates*, the debtor was insolvent. Justice Frankfurter confirmed what the Court's approach implies: after concluding that the state was secured for Tax Lien Act purposes, he did not concur in the judgment on the ground that the priority statute was controlling, but rather dissented from the Court's judgment in favor of the United States. *See id.* at 366-68 (Frankfurter, J., dissenting).[32]

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[32] The government relies heavily on dicta from *United States v. City of New Britain*, 347 U.S. 81 (1954), and *United States v. Vermont*, 377 U.S. 351 (1964). Pet. Br. 21-22. Because both cases involved solvent debtors, *see* 377 U.S. at 352; 347 U.S. at 85, the priority statute was clearly inapplicable, and the Court thus had no occasion to consider its interaction with the Tax Lien Act.

CONCLUSION

The judgment of the Supreme Court of Pennsylvania should be affirmed.

Respectfully submitted,

Of counsel:

LAWRENCE L. DAVIS
DAVIS AND DAVIS
103 South Center Street
Ebensburg, PA 15931
(814) 472-9740

PATRICK F. MCCARTAN
(Counsel of Record)
JONES, DAY, REAVIS & POGUE
North Point
901 Lakeside Avenue
Cleveland, Ohio 44114
(216) 586-3939

GREGORY G. KATSAS
JONES, DAY, REAVIS & POGUE
1450 G Street, N.W.
Washington, D.C. 20005
(202) 879-3939

Counsel for Respondent Romani Industries, Inc.

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STATUTORY APPENDIX

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FEDERAL PRIORITY STATUTE

31 U.S.C. § 3713. Priority of Government claims

(a)(1) A claim of the United States Government shall be paid first when—

(A) a person indebted to the Government is insolvent and—

(i) the debtor without enough property to pay all debts makes a voluntary assignment of property;

(ii) property of the debtor, if absent, is attached; or

(iii) an act of bankruptcy is committed; or

(B) the estate of a deceased debtor, in the custody of the executor or administrator, is not enough to pay all debts of the debtor.

(2) This subsection does not apply to a case under title 11.

(b) A representative of a person or an estate (except a trustee acting under title 11) paying any part of a debt of the person or estate before paying a claim of the Government is liable to the extent of the payment for unpaid claims of the Government.

FEDERAL TAX LIEN ACT OF 1966

26 U.S.C. § 6321. Lien for taxes

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

26 U.S.C. § 6322. Period of lien

Unless another date is specifically fixed by law, the lien imposed by section 6321 shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed (or a judgment against the taxpayer arising out of such liability) is satisfied or becomes unenforceable by reason of lapse of time.

26 U.S.C. § 6323. Validity and priority against certain persons

(a) Purchasers, holders of security interests, mechanic's lienors, and judgment lien creditors

The lien imposed by section 6321 shall not be valid as against any purchaser, holder of a security interest, mechanic's lienor, or judgment lien creditor until notice thereof which meets the requirements of subsection (f) has been filed by the Secretary.

(b) Protection for certain interests even though notice filed

Even though notice of a lien imposed by section 6321 has been filed, such lien shall not be valid—

(1) Securities

With respect to a security (as defined in subsection (h)(4))—

(A) as against a purchaser of such security who at the time of purchase did not have actual notice or knowledge of the existence of such lien; and

(B) as against a holder of a security interest in such security who, at the time such interest came into existence, did not have actual notice or knowledge of the existence of such lien.

(2) Motor vehicles

With respect to a motor vehicle (as defined in subsection (h)(3)), as against a purchaser of such motor vehicle, if—

(A) at the time of the purchase such purchaser did not have actual notice or knowledge of the existence of such lien, and

(B) before the purchaser obtains such notice or knowledge, he has acquired possession of such motor vehicle and has not thereafter relinquished possession of such motor vehicle to the seller or his agent.

(3) Personal property purchased at retail

With respect to tangible personal property purchased at retail, as against a purchaser in the ordinary course of the seller's trade or business, unless at the time of such purchase such purchaser intends such purchase to (or knows such purchase will) hinder, evade, or defeat the collection of any tax under this title.

(4) Personal property purchased in casual sale

With respect to household goods, personal effects, or other tangible personal property described in section 6334(a) purchased (not for resale) in a casual sale for less than $250, as against the purchaser, but only if such purchaser does not have actual notice or knowledge (A) of the existence of such lien, or (B) that this sale is one of a series of sales.

(5) Personal property subject to possessory lien

With respect to tangible personal property subject to a lien under local law securing the reasonable price of the repair or improvement of such property, as against a holder of such a lien, if such holder is, and has been, continuously in possession of such property from the time such lien arose.

(6) Real property tax and special assessment liens

With respect to real property, as against a holder of a lien upon such property, if such lien is entitled under local law to priority over security interests in such property which are prior in time, and such lien secures payment of—

(A) a tax of general application levied by any taxing authority based upon the value of such property;

(B) a special assessment imposed directly upon such property by any taxing authority, if such assessment is imposed for the purpose of defraying the cost of any public improvement; or

(C) charges for utilities or public services furnished to such property by the United States, a State or political subdivision thereof, or an instrumentality of any one or more of the foregoing.

(7) Residential property subject to a mechanic's lien for certain repairs and improvements

With respect to real property subject to a lien for repair or improvement of a personal residence (containing not more than four dwelling units) occupied by the owner of such residence, as against a mechanic's lienor, but only if the contract price on the contract with the owner is not more than $1,000.

(8) Attorneys' liens

With respect to a judgment or other amount in settlement of a claim or of a cause of action, as against an attorney who, under local law, holds a lien upon or a contract enforceable against such judgment or amount, to the extent of his reasonable compensation for obtaining such judgment or procuring such settlement, except that this paragraph shall not apply to any judgment or amount in settlement of a claim or of a cause of action against the United States to the extent that the United States offsets such judgment or amount against any liability of the taxpayer to the United States.

(9) Certain insurance contracts

With respect to a life insurance, endowment, or annuity contract, as against the organization which is the insurer under such contract, at any time—

(A) before such organization had actual notice or knowledge of the existence of such lien;

(B) after such organization had such notice or knowledge, with respect to advances required to be made automatically to maintain such contract in force under an agreement entered into before such organization had such notice or knowledge; or

(C) after satisfaction of a levy pursuant to section 6332(b), unless and until the Secretary delivers to such organization a notice, executed after the date of such satisfaction, of the existence of such lien.

(10) Passbook loans

With respect to a savings deposit, share, or other account, evidenced by a passbook, with an institution described in section 581 or 591, to the extent of any loan made by such institution without actual notice or knowledge of the existence of such lien, as against such institution, if such loan is secured by such account and if such institution has been continuously in possession of such passbook from the time the loan is made.

(c) Protection for certain commercial transactions financing agreements, etc.

(1) In general

To the extent provided in this subsection, even though notice of a lien imposed by section 6321 has been filed, such lien shall not be valid with respect to a security interest which came into existence after tax lien filing but which—

(A) is in qualified property covered by the terms of a written agreement entered into before tax lien filing and constituting—

(i) a commercial transactions financing agreement,

(ii) a real property construction or improvement financing agreement, or

(iii) an obligatory disbursement agreement, and

(B) is protected under local law against a judgment lien arising, as of the time of tax lien filing, out of an unsecured obligation.

(2) Commercial transactions financing agreement

For purposes of this subsection—

(A) Definition

The term "commercial transactions financing agreement" means an agreement (entered into by a person in the course of his trade or business)—

(i) to make loans to the taxpayer to be secured by commercial financing security acquired by the taxpayer in the ordinary course of his trade or business, or

(ii) to purchase commercial financing security (other than inventory) acquired by the taxpayer in the ordinary course of his trade or business;

but such an agreement shall be treated as coming within the term only to the extent that such loan or purchase is made before the 46th day after the date of tax lien filing or (if earlier) before the lender or purchaser had actual notice or knowledge of such tax lien filing.

(B) Limitation on qualified property

The term "qualified property", when used with respect to a commercial transactions financing agreement, includes only commercial financing security acquired by the taxpayer before the 46th day after the date of tax lien filing.

(C) Commercial financing security defined

The term "commercial financing security" means (i) paper of a kind ordinarily arising in commercial transactions, (ii) accounts receivable, (iii) mortgages on real property, and (iv) inventory.

(D) Purchaser treated as acquiring security interest

A person who satisfies subparagraph (A) by reason of clause (ii) thereof shall be treated as having acquired a security interest in commercial financing security.

(3) Real property construction or improvement financing agreement

For purposes of this subsection—

(A) Definition

The term "real property construction or improvement financing agreement" means an agreement to make cash disbursements to finance—

(i) the construction or improvement of real property,

(ii) a contract to construct or improve real property, or

(iii) the raising or harvesting of a farm crop or the raising of livestock or other animals.

For purposes of clause (iii), the furnishing of goods and services shall be treated as the disbursement of cash.

(B) Limitation on qualified property

The term "qualified property", when used with respect to a real property construction or improvement financing agreement, includes only—

(i) in the case of subparagraph (A)(i), the real property with respect to which the construction or improvement has been or is to be made,

(ii) in the case of subparagraph (A)(ii), the proceeds of the contract described therein, and

(iii) in the case of subparagraph (A)(iii), property subject to the lien imposed by section 6321 at the time of tax lien filing and the crop or the livestock or other animals referred to in subparagraph (A)(iii).

(4) Obligatory disbursement agreement

For purposes of this subsection—

(A) Definition

The term "obligatory disbursement agreement" means an agreement (entered into by a person in the course of his trade or business) to make disbursements, but such an agreement shall be treated as coming within the term only to the extent of disbursements which are required to be made by reason of the intervention of the rights of a person other than the taxpayer.

(B) Limitation on qualified property

The term "qualified property", when used with respect to an obligatory disbursement agreement, means property subject to the lien imposed by section 6321 at the time of tax lien filing and (to the extent that the acquisition is directly traceable to the disbursements referred to in subparagraph (A)) property acquired by the taxpayer after tax lien filing.

(C) Special rules for surety agreements

Where the obligatory disbursement agreement is an agreement ensuring the performance of a contract between the taxpayer and another person—

(i) the term "qualified property" shall be treated as also including the proceeds of the contract the performance of which was ensured, and

(ii) if the contract the performance of which was ensured was a contract to construct or improve real property, to produce goods, or to furnish services, the term

"qualified property" shall be treated as also including any tangible personal property used by the taxpayer in the performance of such ensured contract.

(d) 45-day period for making disbursements

Even though notice of a lien imposed by section 6321 has been filed, such lien shall not be valid with respect to a security interest which came into existence after tax lien filing by reason of disbursements made before the 46th day after the date of tax lien filing, or (if earlier) before the person making such disbursements had actual notice or knowledge of tax lien filing, but only if such security interest—

(1) is in property (A) subject, at the time of tax lien filing, to the lien imposed by section 6321, and (B) covered by the terms of a written agreement entered into before tax lien filing, and

(2) is protected under local law against a judgment lien arising, as of the time of tax lien filing, out of an unsecured obligation.

(e) Priority of interest and expenses

If the lien imposed by section 6321 is not valid as against a lien or security interest, the priority of such lien or security interest shall extend to—

(1) any interest or carrying charges upon the obligation secured,

(2) the reasonable charges and expenses of an indenture trustee or agent holding the security interest for the benefit of the holder of the security interest,

(3) the reasonable expenses, including reasonable compensation for attorneys, actually incurred in collecting or enforcing the obligation secured,

(4) the reasonable costs of insuring, preserving, or repairing the property to which the lien or security interest relates,

(5) the reasonable costs of insuring payment of the obligation secured, and

(6) amounts paid to satisfy any lien on the property to which the lien or security interest relates, but only if the lien so satisfied is entitled to priority over the lien imposed by section 6321,

to the extent that, under local law, any such item has the same priority as the lien or security interest to which it relates.

(f) Place for filing notice; form

(1) Place for filing

The notice referred to in subsection (a) shall be filed—

(A) Under State laws

(i) Real property

In the case of real property, in one office within the State (or the county, or other governmental subdivision), as designated by the laws of such State, in which the property subject to the lien is situated; and

(ii) Personal property

In the case of personal property, whether tangible or intangible, in one office within the State (or the county, or other governmental subdivision), as designated by the laws of such State, in which the property subject to the lien is situated, except that State law merely conforming to or reenacting Federal law establishing a national filing system does not constitute a second office for filing as designated by the laws of such State; or

(B) With clerk of district court

In the office of the clerk of the United States district court for the judicial district in which the property subject to the lien is situated, whenever the State has not by law designated one office which meets the requirements of subparagraph (A); or

(C) With Recorder of Deeds of the District of Columbia

In the office of the Recorder of Deeds of the District of Columbia, if the property subject to the lien is situated in the District of Columbia.

(2) Situs of property subject to lien

For purposes of paragraphs (1) and (4), property shall be deemed to be situated—

(A) Real property

In the case of real property, at its physical location; or

(B) Personal property

In the case of personal property, whether tangible or intangible, at the residence of the taxpayer at the time the notice of lien is filed.

For purposes of paragraph (2)(B), the residence of a corporation or partnership shall be deemed to be the place at which the principal executive office of the business is located, and the residence of a taxpayer whose residence is without the United States shall be deemed to be in the District of Columbia.

(3) Form

The form and content of the notice referred to in subsection (a) shall be prescribed by the Secretary. Such notice shall be valid notwithstanding any other provision of law regarding the form or content of a notice of lien.

(4) Indexing required with respect to certain real property

In the case of real property, if—

(A) under the laws of the State in which the real property is located, a deed is not valid as against a purchaser of the property who (at the time of purchase) does not have actual notice or knowledge of the existence of such deed unless the fact of filing of such deed has been entered and recorded in a public index at the place of filing in such a manner that a reasonable inspection of the index will reveal the existence of the deed, and

(B) there is maintained (at the applicable office under paragraph (1)) an adequate system for the public indexing of Federal tax liens,

then the notice of lien referred to in subsection (a) shall not be treated as meeting the filing requirements under paragraph (1) unless the fact of filing is entered and recorded in the index referred to in subparagraph (B) in such a manner that a reasonable inspection of the index will reveal the existence of the lien.

(5) National filing systems

The filing of a notice of lien shall be governed solely by this title and shall not be subject to any other Federal law establishing a place or places for the filing of liens or encumbrances under a national filing system.

(g) Refiling of notice

For purposes of this section—

(1) General rule

Unless notice of lien is refiled in the manner prescribed in paragraph (2) during the required refiling period, such notice of lien shall be treated as filed on the date on which it is filed (in accordance with subsection (f)) after the expiration of such refiling period.

(2) Place for filing

A notice of lien refiled during the required refiling period shall be effective only—

(A) if—

(i) such notice of lien is refiled in the office in which the prior notice of lien was filed, and

(ii) in the case of real property, the fact of refiling is entered and recorded in an index to the extent required by subsection (f)(4); and

(B) in any case in which, 90 days or more prior to the date of a refiling of notice of lien under subparagraph (A), the Secretary received written information (in the manner prescribed in regulations issued by the Secretary) concerning a change in the taxpayer's residence, if a notice of such lien is also filed in accordance with subsection (f) in the State in which such residence is located.

(3) Required refiling period

In the case of any notice of lien, the term "required refiling period" means—

(A) the one-year period ending 30 days after the expiration of 10 years after the date of the assessment of the tax, and

(B) the one-year period ending with the expiration of 10 years after the close of the preceding required refiling period for such notice of lien.

(4) Transitional rule

Notwithstanding paragraph (3), if the assessment of the tax was made before January 1, 1962, the first required refiling period shall be the calendar year 1967.

(h) Definitions

For purposes of this section and section 6324—

(1) Security interest

The term "security interest" means any interest in property acquired by contract for the purpose of securing payment or performance of an obligation or indemnifying against loss or liability. A security interest exists at any time (A) if, at such time, the property is in existence and the interest has become protected under local law against a subsequent judgment lien arising out of an unsecured obligation, and (B) to the extent that, at such time, the holder has parted with money or money's worth.

(2) Mechanic's lienor

The term "mechanic's lienor" means any person who under local law has a lien on real property (or on the proceeds of a contract relating to real property) for services, labor, or materials furnished in connection with the construction or improvement of such property. For purposes of the preceding sentence, a person has a lien on the earliest date such lien becomes valid under local law against subsequent purchasers without actual notice, but not before he begins to furnish the services, labor, or materials.

(3) Motor vehicle

The term "motor vehicle" means a self-propelled vehicle which is registered for highway use under the laws of any State or foreign country.

(4) Security

The term "security" means any bond, debenture, note, or certificate or other evidence of indebtedness, issued by a corporation or a government or political subdivision thereof, with interest coupons or in registered form, share of stock, voting trust certificate, or any certificate of interest or participation in, certificate of deposit or receipt for, temporary or interim certificate for, or warrant or right to subscribe to or purchase, any of the foregoing; negotiable instrument; or money.

(5) Tax lien filing

The term "tax lien filing" means the filing of notice (referred to in subsection (a)) of the lien imposed by section 6321.

(6) Purchaser

The term "purchaser" means a person who, for adequate and full consideration in money or money's worth, acquires an interest (other than a lien or security interest) in property which is valid under local law against subsequent purchasers without actual notice. In applying the preceding sentence for purposes of subsection (a) of this section, and for purposes of section 6324—

(A) a lease of property,

(B) a written executory contract to purchase or lease property,

(C) an option to purchase or lease property or any interest therein, or

(D) an option to renew or extend a lease of property, which is not a lien or security interest shall be treated as an interest in property.

(i) Special rules

(1) Actual notice or knowledge

For purposes of this subchapter, an organization shall be deemed for purposes of a particular transaction to have actual notice or knowledge of any fact from the time such fact is brought to the attention of the individual conducting such transaction, and in any event from the time such fact would have been brought to such individual's attention if the organization had exercised due diligence. An organization exercises due diligence if it maintains reasonable routines for communicating significant information to the person conducting the transaction and there is reasonable compliance with the routine. Due diligence does not require an individual acting for the organization to communicate information unless such communication is part of his regular duties or unless

he has reason to know of the transaction and that the transaction would be materially affected by the information.

(2) Subrogation

Where, under local law, one person is subrogated to the rights of another with respect to a lien or interest, such person shall be subrogated to such rights for purposes of any lien imposed by section 6321 or 6324.

(3) Forfeitures

For purposes of this subchapter, a forfeiture under local law of property seized by a law enforcement agency of a State, county, or other local governmental subdivision shall relate back to the time of seizure, except that this paragraph shall not apply to the extent that under local law the holder of an intervening claim or interest would have priority over the interest of the State, county, or other local governmental subdivision in the property.

(j) Withdrawal of notice in certain circumstances

(1) In general

The Secretary may withdraw a notice of a lien filed under this section and this chapter shall be applied as if the withdrawn notice had not been filed, if the Secretary determines that—

(A) the filing of such notice was premature or otherwise not in accordance with administrative procedures of the Secretary,

(B) the taxpayer has entered into an agreement under section 6159 to satisfy the tax liability for which the lien was imposed by means of installment payments, unless such agreement provides otherwise,

(C) the withdrawal of such notice will facilitate the collection of the tax liability, or

(D) with the consent of the taxpayer or the Taxpayer Advocate, the withdrawal of such notice would be in the best interests of the taxpayer (as determined by the Taxpayer Advocate) and the United States.

Any such withdrawal shall be made by filing notice at the same office as the withdrawn notice. A copy of such notice of withdrawal shall be provided to the taxpayer.

(2) Notice to credit agencies, etc.

Upon written request by the taxpayer with respect to whom a notice of a lien was withdrawn under paragraph (1), the Secretary shall promptly make reasonable efforts to notify credit reporting agencies, and any financial institution or creditor whose name and address is specified in such request, of the withdrawal of such notice. Any such request shall be in such form as the Secretary may prescribe.

26 U.S.C. § 6324. Special liens for estate and gift taxes

(a) Liens for estate tax

Except as otherwise provided in subsection (c)—

(1) Upon gross estate

Unless the estate tax imposed by chapter 11 is sooner paid in full, or becomes unenforceable by reason of lapse of time, it shall be a lien upon the gross estate of the decedent for 10 years from the date of death, except that such part of the gross estate as is used for the payment of charges against the estate and expenses of its administration, allowed by any court having jurisdiction thereof, shall be divested of such lien.

(2) Liability of transferees and others

If the estate tax imposed by chapter 11 is not paid when due, then the spouse, transferee, trustee (except the trustee of an employees' trust which meets the requirements of section 401(a)), surviving tenant, person in possession of the property by reason of the exercise, nonexercise, or release of a power of appointment, or beneficiary, who receives, or has on the date of the decedent's death, property included in the gross estate under sections 2034 to 2042, inclusive, to the extent of the value, at the time of the decedent's death, of such property, shall be personally liable for such tax. Any part of such property transferred by (or

transferred by a transferee of) such spouse, transferee, trustee, surviving tenant, person in possession, or beneficiary, to a purchaser or holder of a security interest shall be divested of the lien provided in paragraph (1) and a like lien shall then attach to all the property of such spouse, transferee, trustee, surviving tenant, person in possession, or beneficiary, or transferee of any such person, except any part transferred to a purchaser or a holder of a security interest.

(3) Continuance after discharge of fiduciary

The provisions of section 2204 (relating to discharge of fiduciary from personal liability) shall not operate as a release of any part of the gross estate from the lien for any deficiency that may thereafter be determined to be due, unless such part of the gross estate (or any interest therein) has been transferred to a purchaser or a holder of a security interest, in which case such part (or such interest) shall not be subject to a lien or to any claim or demand for any such deficiency, but the lien shall attach to the consideration received from such purchaser or holder of a security interest, by the heirs, legatees, devisees, or distributees.

(b) Lien for gift tax

Except as otherwise provided in subsection (c), unless the gift tax imposed by chapter 12 is sooner paid in full or becomes unenforceable by reason of lapse of time, such tax shall be a lien upon all gifts made during the period for which the return was filed, for 10 years from the date the gifts are made. If the tax is not paid when due, the donee of any gift shall be personally liable for such tax to the extent of the value of such gift. Any part of the property comprised in the gift transferred by the donee (or by a transferee of the donee) to a purchaser or holder of a security interest shall be divested of the lien imposed by this subsection and such lien, to the extent of the value of such gift, shall attach to all the property (including after-acquired property) of the donee (or the transferee) except any part transferred to a purchaser or holder of a security interest.

(c) Exceptions

(1) The lien imposed by subsection (a) or (b) shall not be valid as against a mechanic's lienor and, subject to the conditions provided by section 6323(b) (relating to protection for certain interests even though noticed filed), shall not be valid with respect to any lien or interest described in section 6323(b).

(2) If a lien imposed by subsection (a) or (b) is not valid as against a lien or security interest, the priority of such lien or security interest shall extend to any item described in section 6323(e) (relating to priority of interest and expenses) to the extent that, under local law, such item has the same priority as the lien or security interest to which it relates.

26 U.S.C. § 6324A. Special lien for estate tax deferred under section 6166

(a) General rule

In the case of any estate with respect to which an election has been made under section 6166, if the executor makes an election under this section (at such time and in such manner as the Secretary shall by regulations prescribe) and files the agreement referred to in subsection (c), the deferred amount (plus any interest, additional amount, addition to tax, assessable penalty, and costs attributable to the deferred amount) shall be a lien in favor of the United States on the section 6166 lien property.

(b) Section 6166 lien property

(1) In general

For purposes of this section, the term "section 6166 lien property" means interests in real and other property to the extent such interests—

(A) can be expected to survive the deferral period, and

(B) are designated in the agreement referred to in subsection (c).

(2) Maximum value of required property

The maximum value of the property which the Secretary may require as section 6166 lien property with respect to any estate shall be a value which is not greater than the sum of—

(A) the deferred amount, and

(B) the required interest amount.

For purposes of the preceding sentence, the value of any property shall be determined as of the date prescribed by section 6151(a) for payment of the tax imposed by chapter 11 and shall be determined by taking into account any encumbrance such as a lien under section 6324B.

(3) Partial substitution of bond for lien

If the value required as section 6166 lien property pursuant to paragraph (2) exceeds the value of the interests in property covered by the agreement referred to in subsection (c), the Secretary may accept bond in an amount equal to such excess conditioned on the payment of the amount extended in accordance with the terms of such extension.

(c) Agreement

The agreement referred to in this subsection is a written agreement signed by each person in being who has an interest (whether or not in possession) in any property designated in such agreement—

(1) consenting to the creation of the lien under this section with respect to such property, and

(2) designating a responsible person who shall be the agent for the beneficiaries of the estate and for the persons who have consented to the creation of the lien in dealings with the Secretary on matters arising under section 6166 or this section.

(d) Special rules

(1) Requirement that lien be filed

The lien imposed by this section shall not be valid as against any purchaser, holder of a security interest, mechanic's lien, or judgment lien creditor until notice thereof which meets the requirements of section 6323(f) has been filed by the Secretary. Such notice shall not be required to be refiled.

(2) Period of lien

The lien imposed by this section shall arise at the time the executor is discharged from liability under section 2204 (or, if earlier, at the time notice is filed pursuant to paragraph (l)) and shall continue until the liability for the deferred amount is satisfied or becomes unenforceable by reason of lapse of time.

(3) Priorities

Even though notice of a lien imposed by this section has been filed as provided in paragraph (1), such lien shall not be valid—

(A) Real property tax and special assessment liens

To the extent provided in section 6323(b)(6)

(B) Real property subject to a mechanic's lien for repairs and improvements

In the case of any real property subject to a lien for repair or improvement, as against a mechanic's lienor.

(C) Real property construction or improvement financing agreement.

As against any security interest set forth in paragraph (3) of section 6323(c) (whether such security interest came into existence before or after tax lien filing).

Subparagraphs (B) and (C) shall not apply to any security interest which came into existence after the date on which the Secretary filed notice (in a manner similar to notice filed under section

6323(f)) that payment of the deferred amount has been accelerated under section 6166(g).

(4) Lien to be in lieu of section 6324 lien

If there is a lien under this section on any property with respect to any estate, there shall not be any lien under section 6324 on such property with respect to the same estate.

(5) Additional lien property required in certain cases

If at any time the value of the property covered by the agreement is less than the unpaid portion of the deferred amount and the required interest amount, the Secretary may require the addition of property to the agreement (but he may not require under this paragraph that the value of the property covered by the agreement exceed such unpaid portion). If property having the required value is not added to the property covered by the agreement (or if other security equal to the required value is not furnished) within 90 days after notice and demand therefor by the Secretary, the failure to comply with the preceding sentence shall be treated as an act accelerating payment of the installments under section 6166(g).

(6) Lien to be in lieu of bond

The Secretary may not require under section 6165 the furnishing of any bond for the payment of any tax to which an agreement which meets the requirements of subsection (c) applies.

(e) Definitions

For purposes of this section—

(1) Deferred amount

The term "deferred amount" means the aggregate amount deferred under section 6166 (determined as of the date prescribed by section 6151(a) for payment of the tax imposed by chapter 11).

(2) Required interest amount

The term "required interest amount" means the aggregate amount of interest which will be payable over the first 4 years of the deferral period with respect to the deferred amount (determined as of the date prescribed by section 6151(a) for the payment of the tax imposed by chapter 11).

(3) Deferral period

The term "deferral period" means the period for which the payment of tax is deferred pursuant to the election under section 6166.

(4) Application of definitions in case of deficiencies

In the case of a deficiency, a separate deferred amount, required interest amount, and deferral period shall be determined as of the due date of the first installment after the deficiency is prorated to installments under section 6166.

26 U.S.C. § 6324B. Special lien for additional estate tax attributable to farm, etc., valuation

(a) General rule

In the case of any interest in qualified real property (within the meaning of section 2032A(b)), an amount equal to the adjusted tax difference attributable to such interest (within the meaning of section 2032A(c) (2) (B)) shall be a lien in favor of the United States on the property in which such interest exists.

(b) Period of lien

The lien imposed by this section shall arise at the time an election is filed under section 2032A and shall continue with respect to any interest in the qualified real property—

(1) until the liability for tax under subsection (c) of section 2032A with respect to such interest has been satisfied or has become unenforceable by reason of lapse of time, or

(2) until it is established to the satisfaction of the Secretary that no further tax liability may arise under section 2032A(c) with respect to such interest.

(c) Certain rules and definitions made applicable

(1) In general

The rule set forth in paragraphs (1), (3), and (4) of section 6324A(d) shall apply with respect to the lien imposed by this section as if it were a lien imposed by section 6324A.

(2) Qualified real property

For purposes of this section, the term "qualified real property" includes qualified replacement property (within the meaning of section 2032A(h) (3) (B)) and qualified exchange property (within the meaning of section 2032A(i) (3)).

(d) Substitution of security for lien

To the extent provided in regulations prescribed by the Secretary, the furnishing of security may be substituted for the lien imposed by this section.